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97-2039

No._____

Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1997

ALAN HAVIGHURST AND DOUGLAS HAVIGHURST,
Petitioners

v.

THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, EXECUTOR OF THE ESTATE OF WALTER HAVIGHURST,
Respondent

On Petition for a Writ of Certiorari to the Court of Appeals of Ohio, Butler County

---

PETITION FOR A WRIT OF CERTIORARI

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166 pp

QUESTIONS PRESENTED

I.

WHERE ONE STATE STATUTE CONFERS CONCURRENT JURISDICTION ON TWO CO-EQUAL STATE COURTS REGARDING THE SUBJECT MATTER OF CHARITABLE TRUSTS, AND A JURY TRIAL IS MANDATORY WHERE DEMANDED IN ONE COURT ACCORDING TO A SECOND STATUTE BUT IS DISCRETIONARY WHERE DEMANDED IN THE CO-EQUAL COURT ACCORDING TO A THIRD STATUTE, THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS VIOLATED WHERE CITIZENS OF THE UNITED STATES ARE DENIED A JURY TRIAL FOR THE ADJUDICATION OF THEIR RIGHTS TO SPECIFIC PERSONAL PROPERTY AND MONEY.

II.

WHETHER A STATE TRIAL COURT'S EXTINGUISHING *IPSE DIXIT* OF THE REVERSIONARY INTERESTS OF HEIRS AT LAW WITH RESPECT TO A CHARITABLE TRUST INTENDED TO PROMOTE INTERNATIONAL UNDERSTANDING BETWEEN THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS IS A TAKING WITHOUT COMPENSATION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

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Helen Havighurst Berk

Dorothy Havighurst Kucera

Miriam Havighurst Johnson

James P. Havighurst

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IN THE SUPREME COURT OF THE UNITED STATES
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Petition for A Writ of Certiorari To
The Court of Appeals
Of Ohio, Butler County

Alan Havighurst and Douglas Havighurst respectfully petition for a writ of certiorari to the Court of Appeals of Ohio, Butler County in this case.

OPINIONS BELOW

The opinion of the Twelfth District Court of Appeals of Ohio, Butler County, a copy of which appears in Appendix A, *infra*, to this Petition (at 3a-25a), is unreported.

JURISDICTION

The Twelfth District Court of Appeals of Ohio, Butler County, entered its judgment on June 2, 1997 (App. A, 26a-27a). A motion to certify the record to the Ohio Supreme Court was denied October 1, 1997. This entry is attached at Appendix C-1. A Motion for Reconsideration to the Ohio Supreme Court was denied November 12, 1997 and is attached at Appendix C (93a).

The jurisdiction of the Supreme Court of the United States is based on 28 U.S.C. Sec. 1257. This provision is invoked because the case involves a final judgment rendered by the highest court in which a decision could be had and the case is one in which an important question of federal constitutional law has not been, but should be, settled by this Court.

CONSTITUTION AND STATUTES INVOLVED

This case involves the Equal Protection Clause of Amendment XIV of the United States Constitution, and the "Takings" Clause of Amendment V of the United States Constitution (as made applicable to the states through the Due Process Clause of Amendment XIV). These provisions are set out at Appendix D, *infra* (at 96a).

As well, Ohio statutes are at issue. These statutes, Ohio Revised Code Sections 2101.24(B), 2101.31, and 2311.04, are set out in pertinent part at Appendix D (at 97a-98a).

STATEMENT

This case concerns the viability and continuing existence of a private testamentary charitable trust designed for the purpose of "building cross-cultural understanding between the peoples of the United States of America and the Union of Soviet Socialist Republics" through the funding of projects specified in the testamentary instrument. (These provisions are produced in their entirety at *App. E, 102a-103a.*) Walter Havighurst, the testator and author of novels and historical works,

executed his Last Will and Testament on September 7, 1988 and added a codicil October 11, 1989. In December 1991 representatives of the Russian Federation, Belarus, and the Ukraine acknowledged in the Brest Declaration that the Soviet Union could no longer be viewed as a political entity according to international law. On February 3, 1994, Walter Havighurst died at the age of 92 without having re-addressed the plan for his estate subsequent to the demise of the Soviet Union.

Testator left an estate valued at approximately $6.2 million according to the estate's Inventory, consisting of approximately $6,000,000 in personal property and cash with the balance in real property (*App. E, 104a-106a*). The testator did not provide for a successor plan if the trust could not be carried out, and the Trustee of the putative charitable trust, The First National Bank of Southwestern Ohio, was not granted any authority to act outside the express terms of the trust or to change any terms in the instrument in the event of unforeseen contingencies (such as the fall of the Soviet Union). The President of Miami University was designated by the Testator as an advisor to the Trustee regarding funding of the designated projects. The instrumentality for carrying out the projects was stated to be "The Miami University International Center, Oxford, Ohio", an entity which Miami University admitted had no legal existence under Ohio law in interrogatories propounded during the discovery process.

The First National Bank of South-western Ohio, Executor of the Estate of

Walter Havighurst, commenced this declaratory judgment action in the Probate Division of the Common Pleas Court of Butler County, Ohio on October 20, 1994. The Executor alleged, and sought judicial confirmation of, *inter alia*, the following: (1) that "the terms of the charitable trust as set out in the Will create no reversionary interests in the heirs of testator" (*App. E, 115a, para. 12*); (2) "that the trustee would be authorized by the terms of the Will to provide funding for programs related to the USSR as it previously existed ... and for programs related to people or institutions previously or currently located within the areas formerly occupied by the Soviet Union." (*App.E, 116a, para. D of prayer for relief*); and (3) that Miami University, a state institution, "is the beneficiary of the charitable trust". (*App. E, 115a, para.11*)

Ten heirs at law of decedent, the Ohio Attorney General, Miami University, and two miscellaneous parties were joined as Defendants. Petitioners Douglas Havighurst and Alan Havighurst filed separate but substantially identical Answers and Counter-claims. These responses controverted certain allegations set forth in the Complaint (including, *inter alia*, that Miami University was the sole beneficiary of the trust), demanded trial by jury on all issues so triable, and asked that the putative

trust be declared invalid given the demise of the Soviet Union and the apparent impossibility of carrying out the trust as written. Given such circumstances, petitioners asked that the property comprising the trust's corpus pass according to the Ohio statute of descent and distribution (Ohio Revised Code Section 2105.06, *App.D, 100a*).

The Ohio Attorney General answered by denying for want of knowledge that "Miami University" was the beneficiary of the trust. Miami University, through an attorney acting as "Special Counsel to the Ohio Attorney General", filed a pleading that stated it "echoed" the Plaintiff's allegations.

Petitioners endorsed upon their Answers and Counterclaims demands for a jury trial, and the matter was set down for trial by jury in the Probate Division of the Common Pleas Court of Butler County, Ohio. Thereafter, the Executor filed a motion to strike the jury demands and, after oral arguments on the issue, the motion to strike was granted by the probate judge. (*App. B, 32a-34a*) In addition, the Executor filed a motion for summary judgment with respect to which Petitioners filed memoranda in opposition. After oral argument, the motion for summary judgment was overruled (*App. B, 35a-38a*).

The matter proceeded to a two-day trial on the merits, with the probate judge hearing the case without a jury. Issues tried included: (1) the existence of the Soviet Union; (2) the political continuity between what was the Union of Soviet Socialist Republics from 1917-1991 and what the region had become as of the date of trial; (3) the

Testator's intent for the proposed charitable trust; (4) whether the charitable intent was general or specific; (5) whether the proposed plan could reasonably be carried out according to its terms given the fragmentation of the Soviet Union into fifteen separate political, economic, and social units; (6) whether the end of the Cold War rendered the plan a nullity; and (7) the applicability of the *cy pres* doctrine and deviation doctrines.

The Executor and Miami University shared an expert witness, Paul Goble, an international affairs consultant; the Petitioners' expert was Dr. Heather Hogan, Professor of History and Soviet Studies at Oberlin College, Oberlin, Ohio. These two expert witnesses testified about the events which had sundered the Soviet Union, the current political and economic condition of the political entities which had formerly made up the Soviet Union, and the meaning of certain words and terms of art in the testamentary instrument. The experts agreed that the Union of Soviet Socialist Republics ceased to exist by the end of 1991, that the Cold War as had existed since the 1940's was over, and that where there had been the Union of Soviet Socialist Republics, there were now fifteen "republics", with some participating in a loose confederation for mutual debate and planning called the Commonwealth of Independent States. There was disagreement on other issues.

Five and a half months after the trial, the court handed down its "Findings of Fact and Conclusions of Law." Specifically, thirty (30) Findings of Fact and twenty-four (24) Conclusions of Law were delivered. The

court variously assigned four issues to both categories. (See Chart comparing court's treatment of these four issues at *App. E, 118a-120a*) The probate court judge decreed that the proposed trust could be carried out as written, that Miami University was a beneficiary of the trust, and that it was a valid charitable trust under the laws of Ohio. The trial court said that Walter Havighurst intended to promote a program between "peoples of the Soviet Union and the United States" meaning ethnic groups (rather than political entities); that the nonexistence of the Soviet Union as a political entity "is of no importance in carrying out the terms of the charitable trust" (*Find. of Fact No. 29, App. 79a, Conc. Of Law No.13, App. 82a*); that "the continued existence of the Soviet Union was not intended by the testator to be an integral factor in testator's over-all plan." (*Conc. of Law No. 13, App. 82a, Find. of Fact No. 26, App. 79a*). The Court issued three orders which were journalized December 15, 1995, February 20, 1996, and February 21, 1996 (*App. A, 3a-28a*). These orders dismissed Petitioners' counterclaims and ordered the funding of the charitable trust to proceed consistent with the decision.

Petitioners filed Notices of Appeal to the Twelfth District Court of Appeals of Ohio, Butler County, and briefs to such court followed. The judges of the Twelfth District recused themselves, and the case was sent by Ohio Supreme Court Chief Justice Thomas Moyer to a panel comprised of three appellate judges who normally sit on the First Appellate District. Oral argument was conducted November 22, 1996. The Court's

Opinion and Judgment Entries were issued on June 2 and 16, 1997 (*App. A, 3a-28a*). Petitioners filed a Motion to Certify to the Ohio Supreme Court on July 15, 1997, which was denied, with Chief Justice Moyer dissenting (*App. C, 93a*). A Motion for Rehearing was filed with the Ohio Supreme Court on October 14, 1997 and denied on November 12, 1997, with Chief Justice Moyer dissenting (*App. C, 94a*).

How Petitioners Raised Federal Questions Below

(First Question Presented For Review)

Petitioners each made jury demands on the face of their Answers and Counterclaims. The original trial judge in this case, Judge Stephen Powell, after a hearing, set the matter down for a jury trial (*App. B, 30a-31a*). Thereafter, upon the assignment of this matter to Probate Division Judge Randy Rogers the Executor filed a Motion to Strike the Jury Demands, which motion was granted by means of an "Opinion and Entry Denying Demands for Jury" issued by Judge Rogers. (*App. B, 32a-34a*). Federal Seventh and Fourteenth Amendment issues and Ohio constitutional issues regarding the jury issue were raised by Petitioners. Before the Court of Appeals, Petitioners appealed the trial court's order setting out the denial of the jury as a separate assignment of error, citing the Equal Protection and Due Process Clauses of the United States Constitution, as noted by the Court of Appeals in its Opinion (*App.A, 14a-17a*).

Upon affirmance of the trial court by the Court of Appeals, Petitioners raised the federal issues regarding the right to jury

trial including equal protection and due process under the United States Constitution in a pleadings to the Ohio Supreme Court seeking its review of this case (*App. D, 124a-127a*).

(Second Question Presented for Review)

In their Answers and Counterclaims, Petitioners each denied the allegation set forth in the Executor's Complaint regarding the non-existence of any "reversionary interest" inuring to "any heirs of the Donor." (*Compl., App. E, 115a, para.12*) At the trial stage, Petitioners asserted the right to present and future property interests regarding the matter under litigation pursuant to federal constitutional law and Ohio law indicating that such property could not be taken from the heirs at law without just compensation. Having received an adverse ruling from the trial court, Petitioners appealed to the Twelfth District Court of Appeals of Ohio, Butler County, on the basis that the trial court, by entering the orders which it did, effected a non-compensated "taking" of the heirs' rights in reversion without just compensation, violated the Fifth and Fourteenth Amendments to the United States Constitution, and failed to adhere to applicable state law. (*App. E, 122a*).

After an adverse ruling by the Court of Appeals, Petitioners filed a Motion seeking review by the Ohio Supreme Court, raising the Fifth and Fourteenth Amendments to the United States Constitution as grounds for hearing the "takings" issue. (*App. E, 124a*) The same federal issues were raised in the Motion for Reconsideration.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted to Determine Whether the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution Requires A Jury Trial Upon Timely Demand Under Circumstances Where State Statutory Provisions Are In Conflict and Fundamental Rights Are at Stake.

The Court should hear this matter to discern how loosely related state statutes coming to bear on a single subject may work to deny citizens of the United States the equal protection of the law. Facially neutral statutes were used here in abrogation of constitutional principles to reach a result inconsistent with the statute mandating a jury. The Ohio Legislature has set forth conditions for a jury trial in a civil proceeding. With that being the case, Petitioners assert that Ohio courts must observe federal constitutional principles when deciding whether a jury trial is mandatory. Here, the Equal Protection Clause of the Fourteenth Amendment is violated where the right to jury in civil cases is explicitly guaranteed by statute, but is disavowed in this specific case by a state court's errant ruling.

Petitioners assert that the United States Constitution has been violated because Ohio lawmakers enacted conflicting statutes on a matter affecting fundamental rights, thus setting the stage for the kind of "invidious discrimination, the wholly arbitrary act, which cannot stand

consistently with the Fourteenth Amendment." *City of New Orleans v. Dukes*, 427 U.S. 297, at 303-304 (1976). Such discrimination occurs when state courts *apply* statutes which implicate fundamental personal rights and privileges of citizenship, and they are applied in such a way that the fundamental rights guaranteed by statutes are disavowed as to *some* litigants but not *all* litigants. The result of this mischief can be stated thus: He who loses the race to the courthouse loses the choice of forum. Having lost the choice of forum, such litigant loses the right to a jury.

The Ohio statutes in question (which are set forth at Appendix D, *infra*, at 97a-98a) address the jurisdiction of Common Pleas Courts - Probate Divisions and Common Pleas Courts - General Divisions in matters involving charitable trusts, and the right to jury trial in civil cases. Paragraph 7 of the Executor's Complaint (*App. E, 114a*) identified Ohio Revised Code Section 2101.24 as the statutory basis for the trial court's jurisdiction. An examination of that statute and more particularly of subdivision (B)(1)(b) thereof reveals that it expressly establishes <u>concurrent</u> jurisdiction in Ohio Common Pleas Courts-<u>Probate</u> Divisions and Common Pleas Courts-<u>General</u> Divisions for matters involving charitable trusts. Further, Ohio Revised Code Section 2101.31 states that in Probate Court, the probate judge shall have <u>discretion</u> as to whether questions of fact shall be tried to a jury. However, Ohio Revised Code Section 2311.04 states that a jury is <u>mandatory</u> in actions in Common Pleas Courts where — as here — <u>questions of fact</u> needed to be determined and

where money or the recovery of personal property is sought. Here, Petitioners asserted their rights to jury trial and to the recovery of money and specific personal property on the theory that the putative testamentary charitable trust had failed *ab initio*, but the case had already been filed in Common Pleas Court-Probate Division.

Ohio Revised Code Section 2311.04 would have mandated a jury for issues of fact in Common Pleas-General Division where this case could have been originally filed. While the denial of jury in Probate Court for issues of fact was ostensibly in the discretion of the judge according to Ohio Revised Code Section 2101.31, it here worked to deny Petitioners the right to a jury trial in violation of the equal protection clause since there were factual issues in need of resolution and Ohio Revised Code Section 2311.04 mandates a jury in the co-equal court of concurrent jurisdiction. That Probate Courts and General Division Courts are co-equals is established by the court system's enabling provision, Ohio Constitution Article IV, Sec. IV(C), and provisions contained in Ohio Revised Code Section 2101.32 and 2101.24(B)(2) (*App. D, infra, 99a-100a*).

The estate was one in which the heirs, at the moment of testator's death, held recognized interests. The Executor prepared and filed a document to fulfill statutory requirements on which the testator's "next of kin" were listed as survivors "who are or would be entitled to inherit under the statutes of descent and distribution" (App. E, 107a-109a); the property was valued at $6.3 million in the estate's opening inventory (*App. E, 104a-106a*). After taxes,

expenses, bequests, and a devise or real property, the value of the estate stood at approximately $4.5 million in December 1995. Clearly, the heirs' interests were not *de minimis*. Here, Ohio Revised Code Section 2101.31 allowing probate courts to exercise discretion regarding the granting of a jury trial cannot be allowed to trump the right to jury trial set out in Ohio Revised Code Section 2311.04. Federal constitutional principles must here prevail to prevent such a result.

Once set out by state statute, a right enacted legislatively for jury trial with regard to property interests of citizens is a fundamental right. The heirs of Walter E. Havighurst had basic civil rights at stake at the moment of the institution of this lawsuit:

> "That rights in property are basic civil rights has long been recognized. J. Locke, Of Civil Government, 82-85 (1924); J. Adams, A Defence of the Constitutions of Government of the United States of America, in F. Coker, Democracy, Liberty, and Property 121-132 (1942); 1 W. Blackstone, Commentaries 138-140."

Lynch v. Household Finance Corp., 405 U.S. 538, 551 (1972).

Further, this Court articulated the core principle as follows:

> "[e]quality in the enjoyment of property rights was regarded by the framers of that [Fourteenth] Amendment as an essential precondition to the

> realization of other basic civil rights and liberties which the Amendment was intended to guarantee."

Id., 405 U.S. at 544, quoting *Shelley v. Kraemer*, 331 U.S. 1, 10 (1948).

Thus, the right to a jury trial to weigh evidence and to resolve competing claims regarding the substantial property interests at stake here from the Petitioners' Petitioners' perspective must, based on Ohio law and constitutional principles, be found to merit classification as a "substantial" right. As such, a "compelling state interest" analysis must be undertaken - that is, it must be demonstrated such disparate treatment with regard to fundamental rights is somehow necessary to achieve a compelling governmental purpose. That was not even attempted, much less achieved here.

As the Sixth Circuit Court of Appeals noted in *Pratt v. National Distillers & Chemical Corp.*, 853 F. 2d 1329, 1335-36 (6th Cir. 1988), *reh'g. & reh'g. en banc denied*, 1988: "The right to a jury trial under Ohio law has been held to be a *fundamental*, substantial right and not merely a question of procedure." (emphasis added), citing *Cleveland Ry. Co. v. Halliday*, 127 Ohio St. 278, 283-84, 188 N.E. 1, 3 (1933). A right to a jury trial, is a bedrock privilege traditionally subject to zealous protection:

> "[T]he right to a jury trial does not involve merely a question of procedure. The right to a jury trial derives from Magna Carta. It is reasserted both in the Constitution of the United States

> and the Constitution of the State of Ohio. For centuries it has been held that the right of trial by jury is a fundamental constitutional right, a substantial right. . . ."

Cleveland Ry. Co v. Halliday, *supra*, 127 Ohio St. 278 at 283-84, 188 N.E. at 3 (rule of civil court allowing six jurors to be empanelled in a civil case instead of twelve declared invalid on the basis of the above-quoted language).

If the very same action had been brought in the general division of the same Ohio court a different result as to jury trial obtains; mandatory status would obtain as to a jury demand in an Ohio Common Pleas Court-*General* Division. This is disparate treatment of similarly situated citizens with regard to a fundamental right for which no justification by the State of Ohio has been advanced. As this Court stated in *Yick Wo v. Hopkins*, 118 U.S. 350, 373-74 (1886):

> "[t]hough the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice, is still within the prohibitions of the Constitution."

The Equal Protection Clause of the Fourteenth Amendment protects against state action, and the protection extends to "the

action of state courts and judicial officers in their official capacities." *Shelley v. Kraemer, supra,* 334 U.S. at 14. As is, the Ohio General Assembly's broad intention that all cases with issues of fact involving the recovery of specific personal property or money be accorded a jury trial is thwarted if it is not applied to the situation of charitable trusts, which the selfsame General Assembly has stated can be filed in either General Division or Probate Division of Ohio Common Pleas Courts. Where jury trial is extended by statute but then, as here, denied judicially in any particular instance, equal protection of the laws is abridged.

The Equal Protection violation is particularly egregious here where the proceeding involved is an estate administration controlled by statutes of the state's own devising. Moreover, the Ohio Attorney General and Miami University, an instrumentality of the State of Ohio (for authorities supporting this proposition, see *infra* at pp.26-27), took positions contrary to Petitioners in this case. Where construction of ambiguous language should be made in favor of the interests of the citizenry, such language was instead construed narrowly in favor of the State, which was responsible for drafting the disputed statutory language. This is in conflict with common law principles of statutory construction, as well as contrary to underlying equitable principles.

Jury trials are not strangers to Probate Division courts in Ohio. Ohio statutes mandate jury trial where demanded in will contests, ante mortem determinations of validity, and land appropriation proceedings

(Ohio Revised Code Sections 2107.72, 2107.081, and 163.09 *et seq.*, respectively). These actions are all tried exclusively in Probate Division Courts. As well, the probate judge has discretion to empanel a jury in any case where there are questions of fact (Ohio Revised Code Section 2101.31). Petitioners submit that in the instant case the striking of the jury demand was violative of the equal protection clause. Thus, in this case a jury was constitutionally mandated given Ohio Revised Code Section 2311.04 and the related statutes.

Ohio case law demonstrates these principles clearly. Ohio Revised Code Section 2311.04, which mandates jury trials in Ohio Common Pleas Courts where money or specific personal property is sought, has been scrupulously followed in cases where fact finding is required. Reversible error was found when a trial court denied a trial by jury where issues of fact existed in a declaratory judgment action in *Solon Chamber of Commerce v. Women's Gen. Hosp.*, 81 Ohio App. 3d 687, 612 N.E.2d 331 (Cuyahoga Cty. App., 1992, *motion to certify over'd.*, 65 Ohio St. 3d 1458, 602 N.E.2d 254 (1992). And see: *Harleysville Mut. Ins. Co. v. Santora*, 3 Ohio App. 3d 257, 444 N.E. 2d 1076 (Cuyahoga Cty. App., 1982); *Brite Metal Treating v. Reserve Iron and Metal, Inc.*, 61 Ohio App. 3d 206, 572 N.E. 2d 703 (Cuyahoga Cty. App., 1988) (the court held that a Common Pleas Court-General Division judge acted inappropriately when he made factual findings that properly should have been determined by a jury, even if invoking so-called equitable powers, and case was reversed and remanded); *cf. Lewis v. Motorists Ins. Co.*, 96 Ohio App.

3d 575, 645 N.E. 2d 784 at 791-792 (Cuyahoga County, 1994) (in declaratory judgment action for damages, court stated "notwithstanding the fact that the trial court bifurcated the declaratory issue from the issue of damages, this action is one for the recovery of money.")

That charitable trust cases can be tried and have been tried in Common Pleas-General Division in Ohio cannot be doubted. See: *DeMar v. Mosely*, 63 Ohio Misc. 2d 102, 619 N.E. 2d 1239 (Highland Cty. Common Pleas, Probate Div., 1993). However, no Ohio cases reconciling the equal protection clause and jury issues involving the concurrent jurisdiction of probate division and general division courts of Ohio has been ruled on conclusively on either the state or federal level. In the matter *sub judice*, while the Court of Appeals analyzed the claimed denial of equal protection from the perspective of Ohio law, the panel limited its consideration of the federal constitutional constructs to a footnote (*App. A, 16a, note 2*).

This case was suffused with issues of fact for resolution before judgment. The issues ranged, in the words of the trial judge, from the existence of "the Union of Soviet Socialist Republics"; who, or what, was denoted at the time of the 1994 trial by the phrase "peoples of the Union of Soviet Socialist Republics and the United States of America"; the applicability of "cy pres doctrine" and "deviation doctrine"; and whether "the fact that the Union of Soviet Socialist Republics no longer exists as a political entity is of no importance in carrying out the terms of the trust in accordance with the intent of Walter

Havighurst" (*Find. of Fact No. 29, at 79a; Concl. of Law No. 13, at 82a*). The probate judge addressed various and sundry other issues in his "Findings of Fact and Conclusions of Law", with four of the most critical inserted, verbatim, into both the "Findings of Fact" and the "Conclusions of Law" portions of that ruling (*See: App. E, 118a-120a*).

Thus, the presence of a jury in this case would have served the beneficial function of causing the judge to separate issues of fact from issues of law. In addition, a jury would have provided common sense experience to make findings of fact. Average citizens are capable of determining facts involving a man's intent even if the subject matter might appear overlaid with expert opinions and academic jargon. "The commonsense judgment of a group of laymen" is an "essential feature" of a jury trial and the function served by it in contemporary society. *Apodaca v. Oregon*, 406 U.S. 404 (1972). The identity of the factfinder is a crucial element bearing on the outcome of a case.

This Court's attention should be given to the substantial constitutional rights in this case. It is apparent that over the next several decades unprecedented amounts of property will pass from one generation to another, from individuals to the state and federal governments by way of estate taxation, and from individuals to tax-exempt groups and charities. It is important that these transfers and exactions be handled with care and respect for the constitutional rights of the numerous individuals and entities involved in such process.

II.

Certiorari Should Be Granted So This Court Can Analyze and Define Certain Specific Property Interests Which Cannot Be Overriden By Governmental Actors Except By Paying Compensation to Property Holders, as Required by the Fifth and Fourteenth Amendments.

The second question Petitioners ask this Court to address is whether the State of Ohio, through a state court judge, can reach out and 'take" private property interests inuring to heirs at law without providing any compensation. The property interests taken are rights in reversion to the corpus of an ongoing charitable trust. While testator did not include a clause in his will stating "I reserve the reversionary interest in this charitable trust to my heirs at law," such interests are implanted therein by operation of law.

Here, the testator had specified a private charitable trust with carefully crafted instructions, conditions, and beneficiaries, but the trial court's order has transformed it into a public charitable trust with only one beneficiary, Miami University of Ohio, a state instrumentality. The result of the entry of the decree by the state court judge stating that the heirs of Walter Havighurst "have no reversionary interest in the trust estate" (Concl.of Law No. 24; App. B, 86a) is a "taking" by a state judicial actor, and as such, "state action" (*Shelley v. Kraemer, supra,* 334 U.S at 14), triggering

the need to award just compensation to the heirs under the Takings Clause, the Fifth Amendment to the Constitution of the United States, which is made applicable to the states through the Fourteenth Amendment. *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226, 239 (1897).

The probate court acted *ipse dixit* here and erroneously invoked its state powers. The familiar words of the Fifth Amendment - "nor shall private property be taken for public use, without just compensation" - protect citizens against such actions. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), like the case *sub judice*, involves a state court's invocation of power to effectuate a constitutionally impermissible "taking". As Justice Blackmun wrote for a unanimous Supreme Court in *Webb's*:

> "To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation. . .This is the very kind of thing that the Takings clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power."

Id., at 164.

In looking at whether there is a "taking", it is essential that a cognizable property interest exist. The corpus of Walter Havighurst's charitable trust consisted of several simultaneous estates: the legal estate held by the First National Bank of Southwestern Ohio as Trustee; the

equitable estate by the trust's beneficiary, and the reversionary estate held by the testator's heirs at law. To remove the reversionary property interests in order to liberate them for use by the State of Ohio is an unconstitutional taking requiring compensation.

William Blackstone, the eminent scholar on the common law, described interests and rights in property to be a "bundle of sticks". W. Blackstone, Commentaries on the Laws of England (Vols. I-IV, 1765-1769). This construct illustrates that various persons or entities may have rights vis a vis particular property and that property has various characteristics and aspects. Indeed, the constitutional deficiencies of the federal statute scrutinized recently by this Court in *Babbitt v. Youpee*, __ U.S. __, 117 S.Ct. 727, 136 L.Ed.2d. 696 (1997) arose from the fact such statute "continue[d] to completely abolish one of the sticks in the bundle of rights [constituting property]." *Id.*, citing the Ninth Circuit Court of Appeals' decision in *Youpee*, 67 F.3d 194, at 200 (1995). Even though a particular stick in the "bundle" might appear to be a slender one, however narrow the bounds of a particular property right, whatever is within those bounds counts as property.

"Property interests. . .are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Bd. Of Regents v. Roth*, 408 U.S. 564, 577 (1972). The right to reversion has unquestionably attained status as a cognizable property interest under Ohio law; therefore, such a

right must be honored and protected from constitutionally impermissible encroachment.

Two Ohio Supreme Court cases and an Ohio statute demonstrate that rights of reversion are cognizable property interests under Ohio law. The first, *Bd. Of Ed. Of Incorporated Village of Van Wert [Edson] v. Inhabitants of Said Town*, 18 Ohio St. 221, 98 Am.Dec. 114 (1868), *overruled in part on other grounds* in *Babin v. City of Ashland*, 160 Ohio St. 328, at 345, 116 N.E. 2d 580, at 596 (1953), has never been overruled on the principle for which it is here cited: that courts of the State of Ohio simply do not have the power to legitimately extinguish the right of reversion. "Is it competent for a court…to extinguish forever the right of reversion…?" the *Van Wert* court asked. Its answer was, "We think judicial power can not legitimately be so far extended." 18 Ohio St. at 226. From the court's perspective in the *Van Wert* case, the extinguishing of rights to reversion is an *ultra vires* act. In this sense *Van Wert* was a precursor to *Webb's Fabulous Pharmacies, supra*, given the latter's utilization of the phrase "*ipse dixit*" to describe an attempt by a state actor to take as its own, under the authority of state statute, private property that is subject to state court jurisdiction.

The second case supporting the proposition that there is a cognizable property right known as the right to reversion under Ohio law is *McMecham v. Bd. Of Education*, 157 Ohio St. 241, 105 N.E. 270 (1952). There, the Ohio Supreme Court made a three-fold finding in its syllabus: 1) lands appropriated by a board of education and subsequently abandoned for specific use of school house revert to

donor or donor's heirs; 2) where there is a taking of private property for public purposes the extent of the interest acquired may not be enlarged by implication; and 3) heirs could not be divested of their contingent right of reversion.

Further, the Ohio Legislature provides for the alienability of rights in reversion in Ohio Revised Code Section 2141.04, which states that "[r]emainders, whether vested or contingent, are descendible, devisable, and alienable in the same manner as estates in possession." *Moore v. Foreman*, 72 Ohio St. 559 (1962) applies this statute. See also: *Merchant v. Adair*, 113 Ohio App. 513, 179 N.E. 2d 159 (1960) (holding that reversionary property interests pass and vest in heirs under the statute of descent and distribution).

Charitable estates can, and sometimes do, fail years after their creation. As noted by Justice Black in *Evans v. Abney*, 96 U.S. 435, 447 (1970) (where a charitable trust failed some forty years after its creation), failure of ongoing charitable trusts "is part of the price we pay for permitting deceased persons to exercise a continuing control over assets owned by them at death." *Id*, at 447. Petitioners assert the right to claim their rights in reversion upon this charitable trust's possible failure or inability to be carried out in the future.

Put another way, the heirs of testator were stripped of their right to succeed in title to the legal and equitable interests in the trust's corpus now held by the First National Bank and Miami University. As an author of a treatise on trusts asserts, if one of more of the following contingencies

happens, the corpus of a charitable trust established for a particular purpose can revert to the heirs: 1) purpose of the trust has become accomplished; 2) purpose has become impossible of achievement; 3) purpose has become illegal. G. Bogert, *Trusts and Trustees*, Sec. 400 (2d ed. rev. 1991), pp. 396-97. Here, if one of the foregoing events were to put an end to the trust some years hence, Walter Havighurst's heirs at law would be foreclosed from succeeding to their proportionate shares because of the trial court's extraordinary order in this regard.

That the probate court judge intended a "taking" of this property interest inuring to the heirs of Walter Havighurst cannot be doubted by reason of the following. First, the probate judge wrote: "Under these circumstances the heirs of the testator have no reversionary interest in the trust estate." (*App. B, 65a*). Second, (at *App. B, 67a*), the court ordered, adjudged and decreed that "the terms of the charitable trust, as set out in the Last Will and Testament of Walter E. Havighurst, create no reversionary interest in the trust estate." Third, in a second Order (at App. B, 90a), he again ordered, adjudged and decreed "that the terms of the charitable trust, as set out in the Last Will and Testament of Walter E. Havighurst, create no reversionary interest in the heirs of Walter E. Havighurst." Finally, he crafted Conclusion of Law No. 24 to read: "The heirs of the Walter E. Havighurst [sic] have no reversionary interest in the trust estate." (*App. B, 86a*)

The extinguishment of reversionary interests of heirs at law in a charitable trust is especially egregious from a

constitutional perspective where, as here, the plaintiff asked in its complaint that "Miami University" be recognized as "the beneficiary of the charitable trust." (emphasis supplied) (*115a, para. 11*), and the probate court complied insofar as it designated Miami University as "a member of the class of beneficiaries of the Walter E. Havighurst Fund" (*Concl. of Law No. 9; 82a*), failing altogether to name the *rest* of said class. Miami University is expressly declared to be a "state university" by Ohio Revised Code Sec. 3315.011. In Ohio, a state university is "an instrumentality of the state", *Collins v. University of Cincinnati*, 3 Ohio App. 3d 183, 444 N.E. 2d 459, at 461 (Hamilton Cty. App. 1981); *Bailey v. Ohio State University*, 487 F. Supp. 601, 605 (S.D. Ohio 1980); or "an arm or alter ego of the state." *Mackey v. Cleveland State University*, 837 F.Supp. 1396, at 1404 (N.D. Ohio 1993).

It was to another arm of the State of Ohio, then, that the Ohio Probate Court judge effectively transferred ownership, to the detriment of the heirs of Walter Havighurst, when he entered orders extinguishing the heirs' reversionary interests in the charitable trust. As well, the court effectively transformed a bequest in trust to a private banking institution as trustee for specific projects for the benefit of a broad range of individuals, including the peoples of the United States of America and the Union of Soviet Socialist Republics, or former Union of Soviet Socialist Republics, into for what has become, from a legal perspective, for all intents and purposes a "gift" for the benefit of the State.

Over a century ago this Court, in

Hopkins v. Grimshaw, 165 U.S. 342, 356-57 (1897), held that property in a charitable trust no longer capable of being carried out must be distributed to heirs at law under a "resulting trust theory". *Evans v. Abney*, *supra*, similarly involved a failed charitable trust. Reversionary interests have a long history in property law and their vitality has continued to present day. At the same time there is evidence the court and legislative bodies have been construing property interests more comprehensively in recent decades to reflect societal changes and economic realities. Nonetheless, here, this Ohio probate court judge was not deterred from taking such reversionary interests *from* the heirs of Walter Havighurst and *for* the benefit of the State of Ohio.

In *Hodel v. Irving*, 481 U.S. 704 (1987) and *Babbitt v. Youpee*, *supra*, this Court viewed governmental abrogation of property rights relating to devise and descent as effectuating "a taking of private property without just compensation, in violation of the Fifth Amendment of the Constitution of the United States." *Youpee*, 117 S.Ct. at 729, citing *Hodel v. Irving*, 481 U.S. 704, at 716-718. As well, the United States Court of Appeals for the Federal Circuit, in *Skip Kirchdorfer v. United States*, 6 F.3d 1573 (Fed. Cir. 1993), supported the proposition that state law claims involving personal property (there, valid liens) may generate legally cognizable property interests requiring compensation within the scope of the Fifth Amendment. *Id.*, at 1580.

The continued viability of heirs' rights of reversion work, at least theoretically and before the decision *sub judice*, to serve a

salubrious societal interest in that they operate in such a way as to give the heirs "standing" to monitor the actions of the Trustee to ensure that the charitable trust's income and corpus, if necessary, are being expended in a manner consonant with the terms of the trust - or, in this case, the reconstituted terms of the trust. *See*: *Maria Miller v. Teachout*, 24 Ohio St. 525, at 535-36 (1874) (heir at law or attorney general may "invoke the interposition of the courts" if trustee abuses his power or if the exercise by the trustee of his powers becomes impossible).

While the Ohio Attorney General is delegated statutory authority also to oversee charitable trusts in Ohio, she obviously has a conflict of interests here where her role as charitable trust enforcement officer assigned the responsibility of assuring that charitable trusts are administered for their beneficiaries conflicts with her status as an executive in the government of the State of Ohio. Thus, one has here the anomalous situation of a state court judge's opinion making the state the beneficiary of a so-called charitable trust which will remain under the auspices of the state Attorney-General's Office, with resulting concerns about possible conflicts of interests.

It should now be clear that the state probate court's "unlawful attempt to extinguish rights arbitrarily, whatever might be the purpose" (*Wilson v. Iseminger*, 185 U.S. 55, 62 (1902), is an unconstitutional attempt to overreach the limits of judicial power. Further, the historic role of the heirs as watchdogs over the trust's proper

expenditures would be eliminated by the court's action.

The State has here run roughshod over the property rights of citizens, arbitrarily taking for itself without just compensation that which "belongs" to its citizens while in the process of administering an estate, thereby violating the Fifth and Fourteenth Amendments to the United States Constitution. It is extremely important not to let such actions go unchecked.

CONCLUSION

WHEREFORE, Petitioners respectfully pray that a writ of certiorari be granted.

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IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

CASE NOS. CA96-03-047
CA96-03-048

OPINION
6/2/97

FIRST NATIONAL BANK OF SOUTH-WESTERN OHIO, Executor of the Estate of Walter E. Havighurst,
Plaintiff-Appellee,

-vs-

MIAMI UNIVERSITY,
and
BETTY D. MONTGOMERY, OHIO ATTORNEY GENERAL,
Defendants-Appellees,
and
ALAN W. HAVIGHURST and DOUGLAS HAVIGHURST,
and
Defendants-Appellants,
and
MARIAM HAVIGHURST JOHNSON, et al.,
Defendants.

CASE NOS. CA96-03-047
CA96-03-048

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Per Curiam. This cause came on to be considered upon a notice of appeal, the transcript of the docket and journal entries, the transcript of proceedings and original papers from the Butler County Court of Common Pleas, and upon the briefs of counsel, oral argument having been waived. Now, therefore, the assignments of error having been fully considered are passed upon in conformity with App.R. 12(A) as follows:

Defendants-appellants, Alan W. Havighurst and Douglas A. Havighurst, have taken the instant appeals from the entry of a declaratory judgment favorable to plaintiff-appellee, First National Bank of Southwestern Ohio ("FNB"), in its capacity as the executor for the estate of Walter E. Havighurst.[1] Appellants present on appeal three assignments of error, in which they challenge the balance struck by the probate court in weighing the evidence before it, the denial of their demands for a jury trial, and various evidentiary rulings. Finding no merit to any aspect of the challenge advanced on appeal, we affirm the judgment of the court below.

The parties' dispute centers on a charitable trust created by the Last

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[1] These appeals have been consolidated for purposes of briefing, argument and disposition.

Will and Testament of FNB's decedent, Walter E. Havighurst ("testator"). The testator executed the will creating the trust on September 7, 1988, and amended it by a codicil dated October 11, 1989. The testator died on February 3, 1994, and, on February 11 of the same year, the will was admitted to probate.

The will made specific bequests of money and/or property to the testator's heirs, including the appellants, and to Miami University, where the testator had served as a professor until his retirement. The will then bequeathed the balance of the testator's estate to FNB, in trust, and directed that it "be used *** to promote and fund educational projects through the Miami University International Center *** for building cross-cultural understanding between the peoples of the United States of America and the Union of Soviet Socialist Republics."

On October 20, 1994, FNB, as executor of the testator's estate, filed an action in the Probate Division of the Butler County Court of Common Pleas, seeking declaratory relief regarding the viability of the trust in the wake of the December 1991 dissolution of the Union of Soviet Socialist Republics ("USSR"). Specifically, FNB sought declarations that the trust created n reversionary interest in the testator's heirs; that the will creating the trust authorized FNB, as trustee, to fund "programs related to the [USSR] as it previously existed *** [and] programs related to the people and institutions previously or currently located within

the areas formerly occupied by the [USSR] ***"; and that the trust was to be funded and executed according to its terms.

Appellants each responded to FNB's complaint with an answer and a counterclaim for declaratory relief. In their counterclaims, as subsequently amended, appellants sought declarations that the political, economic and social conditions of the USSR at the time that the will was executed differed significantly from the conditions at the time that the complaint was filed; that the trust cannot be carried out in accordance with its terms; that Miami University's conduct and its status as an instrumentality of the state of Ohio precludes the preservation of the trust under any equitable doctrine; that the proposed gift by trust has thus failed; and that the residuary estate thus constitutes intestate property that must pass pursuant to R.C. 2105.06, the Statute of Descent and Distribution. Douglas Havighurst, in his counterclaim, additionally and in the alternative sought the implementation of a plan that would require the participation of the testator's heirs and would promote "conflict management[;] *** the reduction of tribal, racial, and ethnic aggression; and [the] management of nuclear materials."

The matter was tried to the probate court, and on December 15,1995, the court entered its Opinion and Judgment Entry of Declaratory Judgment, in which it construed the will to preserve the trust. On February 20, 1996, the court, upon appellants' motions,issued its Amended Entry of Declaratory Judgment

and Findings of Fact and Conclusions of Law, and these appeals ensued.

I.

In their first assignment of error, appellants contend that the probate court erred in declining to declare that the testator's attempted gift in trust had failed and, upon such declaration, to distribute the trust assets to the heirs at law, when the dissolution of the USSR mandated the termination of the trust. Appellants thus, in effect, assail the dismissal of their amended counterclaims and, in essence, challenge the balance struck by the probate court in weighing the evidence adduced at trial. We find no merit to this challenge.

A probate court, in a declaratory judgment action, is authorized to construe a will and to declare the rights and legal relations of persons interested in the administration of an estate or a trust. See R.C. 2101.24(A)(1)(k), 2721.03 and 2721.05(C). The court below, in its amended entry of declaratory judgment, declared that the trust created by the testator's will was a charitable trust and that the will created no reversionary interest in the testator's heirs. The court construed the will's use of the term "Union of Soviet Socialist Republics" to also mean the "former Union of Soviet Socialist Republics" and construed the will's use of the term "Soviet Union" to also mean the "former Soviet Union." Finally, the court ordered that the trust be "fully funded and carried out in

accordance with its terms."

We note at the outset that, in the opinion accompanying the initial entry of declaratory judgment, entered on December 15, 1995, the probate court, having construed the terms "Union of Soviet Socialist Republics," and "Soviet Union" to preserve the trust, concluded that its application of the doctrines of cy pres and deviation would have yielded the same result. T.D. 224, at 13-14. The court's amended entry of declaratory judgment and its findings of fact and conclusions of law, entered on February 20, 1996, superseded the court's December 1995 opinion and entry of judgment, yet manifested the purpose expressed by the court in its superseded opinion to construe the will to uphold the trust without resort to the doctrines of cy pres or deviation. We agree that any discussion of the doctrines would be superfluous. Therefore, we do not reach those aspects of appellants' challenge on appeal that are predicated upon the probate court's alleged misapplication of the doctrines.

Turning then to the merits of appellants' first assignment of error, we note that a court's sole purpose in construing a will is to ascertain and effectuate the intention of the testator. The court must discern the testator's intention from the language of the will. Carr v. Stradley (1977), 52 Ohio St.2d 220, paragraph one of the syllabus; Townsend's Exrs. v. Townsend (1874), 25 Ohio St. 477, paragraphs one and two of the syllabus. However, when the language of the will creates doubt

as to its meaning, the court may consider extrinsic evidence to aid in its determination of the testator's intention. Oliver v. Bank One Dayton. N.A. (1991), 60 Ohio St.3d 32, paragraph one of the syllabus (following Sandy v. Moubot [1982], 1 Ohio St.3d 143, 145).

The court below preserved the trust by construing the terms "Union of Soviet Socialist Republics" and "Soviet Union" to also mean the "former Union of Soviet Socialist Republics" and the"former Soviet Union." The court's construction of these terms was based upon its conclusions that the testator's "primary purpose" in creating the trust was "educational"; that "[t]he testator intended the terms 'Union of Soviet Socialist Republics,' 'Soviet Union,' and 'Soviet' to primary be [sic] descriptive of the 'peoples' that inhabited that area of the world"; and that the testator did not intend that the continued existence of the USSR as a "political entity" be an "integral factor in *** the creation and administration of the [trust]." T.D. 233. These conclusions were, in turn, based upon the court's reading of the text of the will creating the trust and upon testimony adduced at trial that the word "peoples, as used in the will, could be construed to mean the "ethnic ***, cultural ***, linguistic, [and] religious communities" within a "geographical area." T.p. 143-144.

Appellants' counterclaims were predicated upon the assertion that the testator's aim in creating the trust was to ease Cold War tensions between the

United States and the USSR and that, with the demise of the USSR and the concomitant end of the nuclear threat that was the Cold War's most salient feature, the trust has failed in its essential purpose. As we noted supra, the probate court found the language of the will and the evidence adduced at trial to bespeak a purpose on the part of the testator in creating the trust that was educational rather than political, and more personal than institutional. Furthermore, the evidence was uncontroverted that the region still possesses a nuclear capacity that, with the demise of the USSR as a political entity and the consequent destabilization of the region continues to pose a threat to the United States.

The Ohio Supreme Court in C.E. Morris Co. v. Foley Constr. Co. (1978), 54 Ohio St.2d 279, syllabus, held that "[j]udgments supported by some competent, credible evidence going to all of the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." Our review of the record of the proceedings below discloses that the probate court had before it competent and credible evidence to support its entry of declaratory judgment preserving the trust and its dismissal of appellants' counterclaims. We, therefore, overrule appellants' first assignment of error.

II.

In their second assignment of error, appellants challenge the denial of their demands for a jury trial. This challenge is equally untenable.

The Seventh Amendment to the United States Constitution secures the right to a jury trial in a civil action. This guarantee is not, however, applicable to the states. Minneapolis & St. Louis RR. Co. v. Bombolis (1916), 241 U.S. 211, 217, 36 S.Ct. 595, 596; Digital & Analog Design Corp. v. North Supply Co. (1992), 63 Ohio St.3d 657, 662, fn. 1. Article I, Section 5 of the Ohio Constitution similarly preserves "inviolate" the right to a jury trial in a civil action. The right has been judicially limited, however, to those causes of action to which the right adhered that were recognized at common law prior to the adoption of the state constitution. Digital & Analog Design Corp., supra at 661; Pokorny v.International Hod Carriers Bldg. & Common Laborers Union (1974), 38 Ohio St.2d 177, 180.

The right to a jury trial may also be extended by statute. R.C. 2721.10 governs the determination of issues of fact in a declaratory judgment action and provides that "such issue[s] may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending." R.C. 2101.31, which governs the determination of issues of fact in proceedings before a probate court, provides that "[a]ll questions of fact shall be determined by the probate judge, unless he orders them tried by a

jury ***."

Appellants endorsed upon their answers and counterclaims demands for a jury trial. The probate court, upon FNB's motion and following a hearing on the matter, exercised the discretion conferred by R.C. 2101.31 and denied appellants' jury demands.

Appellants contend that the probate court's denial of their demands for a jury trial constituted an error of law and an abuse of discretion. We disagree.

A.

The Ohio Supreme Court in Renee v.Sanders (1953), 160 Ohio St. 279, addressed the issue of whether a litigant in a declaratory judgment action instituted in a probate court possesses a constitutional or statutory right to a jury trial. The court held that the Ohio Constitution does not preserve the right to a jury trial in a declaratory judgment action, because such an action did not exist at common law prior to the adoption of the constitution. Id., paragraph three of the syllabus. The court further held that the Revised Code confers no absolute statutory right to a jury determination of factual issues arising in a declaratory judgment action in probate court. Id., paragraph three of the syllabus. The court thus concluded that, if the subject matter of a declaratory judgment action is within the jurisdiction of the probate court, R.C. 2101.31 (former G.C. 10501-32) governs the trial of the issues, and the determination of whether factual issues will be tried to a jury is committed to

the sound discretion of the probate court. Id., paragraph five of the syllabus; accord, Giurbino v. Giurbino (1993), 89 Ohio App.3d 646; Bobko v. Sagen (1989), 61 Ohio App.3d 397.

R.C. 2101.24(A)(1)(j) and (k) grant the probate court exclusive jurisdiction "[t]o construe wills" and "[t]o render declaratory judgments***." R.C. 2101.24(B)(1)(b) grants the probate court jurisdiction, concurrent with the general division of the common pleas court, "to hear and determine *** [a]ny action that involves *** a charitable trust ***."

In its complaint, FNB invoked the jurisdiction conferred upon the probate court by R.C. 2101.24 and sought declaratory relief involving the charitable trust created by the testator's will. Appellants' counterclaims sought contrary declaratory relief regarding the trust. R.C. 2101.31, therefore, controlled the proceedings at trial and vested the probate court with the discretion to determine whether the factual issues presented in the complaint and the counterclaims would be tried to a jury.

We perceive the relief sought in FNB's complaint and appellants' counterclaims to be predominantly equitable in nature. See Gearhart v. Richardson (1924), 109 Ohio St. 418, paragraph one of the syllabus (holding that an action construing a will creating a trust is equitable in nature); accord Sessions v. Skelton (1955), 163 Ohio St. 409, paragraph seven of the syllabus. Therefore, we cannot say that the probate court's denial of appellants' demands for

a jury trial on the factual issues thereby presented constituted an abuse of its discretion.

B.

Our analysis of appellants' alternative challenge to the denial of their jury demands proceeds from the R.C. 2721.10 requirement that issues of fact in a declaratory judgment action be tried "in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending." R.C. 2311.04, which governs the proceedings in the general division of the common pleas court, provides in relevant part:

> Issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury***. All other issues of fact shall be tried by the Court, subject to its power to order any issue to be tried by a jury ***.

Thus, the determination of whether factual issues in a declaratory judgment action will be tried to a jury, while purely a matter of discretion in the probate court, may be a matter of right in the general division of the common pleas court.

Appellants assert that this statutory scheme creates an irrational legislative distinction, in violation of the equal protection guarantees of Section 2, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States

Constitution. This challenge fails in its central premise.

We note at the outset that the Ohio Supreme Court in its decision in Renee, supra, acknowledged the potential conflict between R.C. 2101.31 and 2311.04, without confronting the equal protection implications. The court noted that the two sections have coexisted since 1853, found no statement in the Revised Code to suggest that R.C. 2311.04 supersedes or overrides R.C. 2101.31, and posited that a determination that R.C. 2311.04 mandated a jury trial would effectively nullify R.C. 2101.31. Id. at 284-285. Having set forth these considerations and held that R.C. 2101.31 vests in the probate court the discretion to determine whether factual issues would be tried to a jury, the court declared its holding to be "entirely consistent with the provisions of [R.C. 2721.10] and *** not [in] conflict with the provisions of [R.C. 2311.04]." Id. at 286.

The constitutionally secured guarantee of equal protection under the law "'implies that all litigants similarly situated may appeal to courts for both relief and defense under like conditions, with like protection, and without discrimination.'" Conley v. Shearer (1992), 64 Ohio St.3d 284, 288, quoting Sexton v. Barry [C.A.6, 1956], 233 F.2d 220, 224. When, as here, a legislative classification implicates neither a fundamental right nor a suspect class, the classification is invalid only if it bears no rational relationship to a legitimate

governmental objective. Adkins v. McFaul (1996), 76 Ohio St.3d 350, 351. See, also, McGowan v. Maryland (1961), 366 U.S. 420, 426, 81 S.Ct. 1101, 1105 (holding that"[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived of to justify it").[2]

As we noted supra, the probate division and the general division of the common pleas court have concurrent jurisdiction to hear and determine an action involving a charitable trust. R.C. 2101.24(B)(1)(b). FNB, therefore, could have instituted and maintained its declaratory judgment action in either the probate division or the general division of the common pleas court.

Once FNB chose to proceed in probate court, appellants' options were limited. As between courts of concurrent jurisdiction, the court that first acquires jurisdiction over the parties has exclusive jurisdiction to adjudicate the matter. Kane v. Kane (1946), 146 Ohio St. 686, syllabus; accord State ex rel. Largent v. Fisher (1989), 43 Ohio St.3d 160, 162 (citing Miller v. Court of Common Pleas (1944), 143 Ohio St. 68, 70). Appellants' counterclaims were compulsory, see Civ.R. 13(A), and being second in time to FNB's claims, they could be asserted only as counterclaims to the complaint filed by FNB in the probate court.

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2. State and federal law provide essentially the same standard for assessing an equal protection violation. Adkins v. McFaul (1996), 76 Ohio St. 3d 350, 351.

Appellants' equal protection challenge is thus premised upon their contention that, had FNB instituted its declaratory judgment action in the general division, rather than the probate division of the common pleas court, R.C. 2311.04, rather than R.C. 2101.31, would have governed the proceedings at trial and would have mandated that the factual issues be tried to a jury. We are not persuaded, however, that R.C. 2311.04 would have conferred upon appellants a right to a jury trial on the factual issues presented in the complaint and in their counterclaims.

As we noted supra, R.C. 2721.10 and 2311.04 mandate a jury trial of factual issues arising in a declaratory judgment action instituted in the general division of the common pleas court if the action is construed to be "for the recovery of money only, or specific real or personal property." The right to a jury trial thereby conferred depends upon the nature and character of the relief sought. Erie Ins. Group v. Fisher (1984), 15 Ohio St.3d 380, 382; Gunsaullus v. Pettit (1988), 46 Ohio St. 27, 29.

When the relief sought is equitable, R.C. 2311.04 confers no right to a jury trial. Erie Ins. Group, supra at 382; City Loan & Savings Co. v. Howard (1984), 16 Ohio App.3d 185, 186. When the pleadings seek a mixture of legal and equitable relief, the right to a jury trial depends upon the action's primary and predominant objective. See, e.g., Murello Constr. Co. v. Citizens Home Savings Co. (1985),

29 Ohio App.3d 333, 334 (holding that a jury trial was not required when the money demand, although specific, was "incidental and ancillary" to the equitable relief requested and would ripen only if equitable relief were granted); Huntington Nat'l. Bank v. Heritage Investment Group (1983), 12 Ohio App.3d 113, 114 (holding that R.C. 2311.04 confers a right to a jury trial on a legal counterclaim that, if true, would extinguish the original equitable claim, but confers no right on a legal counterclaim that is "incidental or ancillary" to the original claim).[3]

In its complaint, FNB sought declaratory relief involving the charitable trust created by the testator's will. Appellants, in their counterclaims, sought contrary declaratory relief regarding the trust, including a declaration that the proposed gift by trust has failed and

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[3] This principle may be seen as a logical extension of the Ohio Supreme Court's decisions in Nordin v. Coulton (1943), 142 Ohio St. 277, and Ireland v. Cheney (1935), 129 Ohio St. 527. The court held in Nordin, paragraph two of the syllabus, that an action is equitable if the right to equitable relief must be determined before legal redress can be granted, but is "at law" if the "primary or paramount" relief sought is legal and the equitable redress is merely incidental. The court held in Ireland, paragraph two of the syllabus, that when the "principal, primary and paramount relief sought***is equitable, the cause is one in chancery notwithstanding the fact that ***incidental thereto the court is compelled to find what amount, if any, is due and owing to the person seeking the relief.

that the residuary estate thus constitutes intestate property that must pass pursuant to the statute of descent and distribution.

The factual issues thereby presented cannot be said to have arisen in an action "for the recovery of money only, or specific real *** property." Nor are we persuaded that appellants' counterclaims transformed the action into one "for the recovery of *** personal property." Even if we were to so characterize appellants' counterclaims, based upon their prayer for a declaration requiring the intestate distribution of the property, such relief would merely be incidental to the declaratory relief sought and would ripen only upon the entry of declaratory relief favorable to appellants. See Murello Constr. Co., supra at 334.

We conclude, instead, that the relief sought was primarily and predominantly equitable. See Gearhart, supra, paragraph one of the syllabus (holding that an action construing a will creating a trust is equitable in nature); accord Sessions, supra, paragraph seven of the syllabus. Therefore, R.C. 2311.04 would not have conferred upon appellants a right to a jury trial.

In the absence of such a right, the challenged statutory scheme does not, with respect to appellants, create the legislative distinction upon which their equal protection argument rests. We, therefore, hold that the probate court's exercise of the discretion conferred by

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R.C. 2101.31 to deny appellants' demands for a jury trial did not violate their constitutionally secured rights to equal protection under the law.[4]

Having thus determined that the probate court's denial of appellants' demands for a jury trial constituted neither an error of law nor an abuse of discretion, we overrule the second assignment of error.

III.

In their third and final assignment of error, appellants challenge the probate court's exclusion of evidence relevant to the testator's intention in establishing the trust and to the issue of whether the trust had failed in its purpose. We find no merit to any aspect of this challenge.

As we noted supra, the probate court preserved the trust by construing the terms "Union of Soviet Socialist Republics" and "Soviet Union" to also mean the "former Union of Soviet Socialist Republics" and the "former Soviet Union." This construction was based, in part, upon testimony by a witness for FNB that the word "peoples," as used in the will, could be construed to mean the "ethnic***, cultural***, linguistic, [and] religious communities" within a "geographical area." Appellants contends that the probate court precluded them from demonstrating that the proposed "change [in] nomenclature"

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[4] Appellants lack standing to mount a third-party equal protection challenge to this legislative scheme. See Cincinnati v. Thompson (1994), 96 Ohio App. 3d 7, 26, fn. 8.

would effect a substantive change in the provisions of the trust, when the court sustained FNB's objection to defense counsel's attempt to elicit testimony, upon cross-examination of the witness, that the trust, "is impractical and in fact impossible to carry *** out as written."

The question posed by defense counsel, in essence, sought expert opinion testimony on the dispositive issue posed by appellants' counterclaims, i.e., whether the trust had failed in its essential purpose. Evid.R. 702 and 704 permit expert opinion testimony that embraces the ultimate issue to be decided by the trier of fact if: (1) the witness is qualified as an expert "by knowledge, skill, experience, training or education"; and (2) "scientific, technical, or other specialized knowledge" will assist the trier of fact to understand the evidence or to decide an issue of fact.

The witness from whom the excluded testimony was sought was qualified as an expert on "international affairs," not the law. He, therefore, did not possess the qualifications to render an expert opinion on the legal effect of a "change [in] nomenclature" on the trust. Alternatively, the probate court might well have concluded that whatever specialized knowledge the witness did possess would have been of no assistance to the court, as the trier of fact, in resolving the issue before it. We, therefore, find no error in the court's exclusion of this testimony.

B.

Appellants also sought, without success, to introduce into evidence a will that the testator allegedly executed in 1987 to show the testator's intention in executing the 1988 will creating the trust. As we noted supra, a court, in construing a will, may look beyond the language of the will and consider extrinsic evidence to aid in its determination of the testator's intention when the language of the will creates doubt as to its meaning. Oliver, 60 Ohio St.3d 32, paragraph one of the syllabus. The decision as to whether and to what extent such extrinsic evidence will be considered in determining the testator's intent is thus committed to the sound discretion of the trial court. We cannot say that the probate court's refusal to consider such evidence in this instance constituted an abuse of discretion.

C.

Finally, the probate court sustained FNB's objection to defense counsel's attempt to elicit, on cross-examination of FNB's international international affairs expert, testimony as to whether, at the time that the will will creating the trust was executed, "the mind that wrote [the will] and understood and signed it could *** possibly have been thinking the same [as] we are thinking today." T.p. 120. We perceive no error in the court's exclusion of this testimony.

The witness clearly lacked the requisite firsthand knowledge to offer

testimony or to express a lay opinion as to the testator's "thinking" in executing the will creating the trust. See Evid. R. 602 and 701. The court, again, might reasonably have excluded expert opinion testimony to that effect, either on the ground that the witness was not qualified to express an expert opinion on the matter or on the basis that expert opinion testimony would not have been helpful to the court's resolution of the issue. See Evid.R. 702. Furthermore, we cannot say that the court's refusal to consider such extrinsic evidence relevant to the testator's intention constituted an abuse of discretion.

Finding no merit to any of appellants' evidentiary challenges, we overrule the third assignment of error.

Having thus considered and found wanting each of appellants' three assignments of error, we affirm the judgment of the trial court.

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas, Probate Division, for execution upon this judgment and that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

Costs to be taxed in compliance with App. R. 24.

SHANNON, P.J., DOAN and GORMAN, JJ., concur.

Shannon, J., retired, of the First Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.

Doan, J., of the First Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), of the Ohio Constitution.

Gorman, J., of the First Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), of the Ohio Constitution.

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY, OHIO

FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, EXECUTOR OF THE ESTATE OF WALTER E. HAVIGHURST	APPEAL NO. CA 96-030047 CA 96-030048 TRIAL NO. 94-0175
Plaintiff-Appellee,	
-vs-	JUDGMENT ENTRY
MIAMI UNIVERSITY	
and	
BETTY D. MONTGOMERY, ATTORNEY GENERAL OF THE STATE OF OHIO,	
Defendants-Appellees,	
and	
ALAN W. HAVIGHURST	
And	
DOUGLAS A. HAVIGHURST,	
Defendants-Appellants,	
and	
MARIAM HAVIGHURST JOHNSON, ET AL.,	
Defendants.	

This cause having been heard upon the appeal, the record and briefs filed herein and arguments, and

Upon consideration thereof, this Court Orders that the judgment of the

trial court is affirmed for the reasons set forth in the Decision filed herein and made a part hereof.

Further, the Court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are to be taxed in complaince with App. R. 24.

The Court further orders that 1) that a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) that the mandate be sent to the trial court for execution pursuant to App. R. 27.

To the Clerk:

Enter upon the Journal of the Court on June 2, 1997 per Order of the Court.

/s/ Raymond Shannon
Presiding Judge

IN THE COURT OF APPEALS
FIR8T APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

FIRST NATIONAL BANK OF
SOUTHWESTERN OHIO

CA96-03-047
CA96-03-048

Appellee, :
vs.

MIAMI UNIVERSITY, et al. :
Appellant :

ENTRY TRANSMITTING
ERRATA

It appearing to the Court that through inadvertence in the Memorandum Decision and Judgment Entry filed herein on June 2, 1997 on the page two the Court indicated that oral argument had been waived.

Whereas in fact, argument was waived by counsel for the Attorney General only and not by other counsel.

Wherefore, it is the Order of this Court that the page two line five of the Memorandum Decision and Judgment Entry is corrected to reflect oral argument by all counsel except the Attorney General.

TO THE CLERK:(COPIES SENT TO ALL COUNSEL)
ENTER UPON THE JOURNAL OF
THE COURT ON JUNE 16 1997
PER ORDER OF THE COURT.

Presiding Judge